IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-147

BOB BULLOCK, ET AL.,
Appellants,

v.

DIANA REGESTER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR APPELLANTS

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INDEX

TABLE OF CITATIONS

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It is virtually impossible for Appellants to respond to each and every argument advanced in the six briefs (including one amicus) filed in support of the judgment below. That most contain factual assertions not supported by the record is obvious from a spot check of their references thereto,[1] and Appellants will not burden this Court with a

[1] For example, the brief filed on behalf of Dr. George Willeford *et al* asserts, at p. 37 n.16, that Robert Spellings, who participated in drawing the House plan, "did not recall 'preserving county lines' when asked about his guidelines, though he named others (Spellings Dep. 76)." But the referenced testimony (8 App. 2294) clearly reveals that Spellings was being asked about

the "guidelines you were instructed to follow in drafting of the map, — we are talking about the *senatorial* map?" There is no provision of the Texas Constitution similar to Article III, Section 26, which requires the preservation of county lines in senatorial districting. According to the Amicus Brief, Mutscher is said to have "confessed himself 'baffled' at the seeming irrationality of the plan (*id.*, [Mutscher Dep.] 29)." Amicus Brief p. 14. An examination of the reference (8 App. 2416) clearly reveals that the witness was referring to the Senate plan (see *id.* at 2420), and that his only objections to the House plan was that he felt it was against the wishes of the House members and unnecessarily paired incumbents against each other (*id.* at 2429-30). These are common errors found in Appellees' record references: attributing testimony as to the Senate plan to the House plan, the only plan in question on this appeal.

For the proposition that the Board "members troubled themselves little to learn each others' views" the Amicus points to p. 18 of Martin's Deposition. At that page (6 App. 1579) Martin testified:

> "I consulted with other members of the Board, the other four of them, informally. I believe all of them visited my office on one occasion or the other, and I visited in the office of, I believe, all of the other members with the exception of the Speaker, and we had various telephone conversations, and the great bulk of the work was done by staff members. . . ."
>
> Q "You say, then, as I understand it, that you consulted with three out of the four other Board members . . ."
>
> A *"I consulted with all of them.* I limited it to the Speaker. The Speaker came to see me, I believe, on two occasions. I did not visit his office. In other words, we exchanged visits between offices, and if I misled you, I am sorry. I went to all of them's offices with the exception of the Speaker's Office. I don't recall going there. I might have, but I don't recall it right now." (emphasis added throughout unless otherwise indicated).

The Bernal Brief asserts that the Board made no use of the plan adopted by the legislature and held deficient in *Smith* v. *Craddick*. Bernal Brief p. 6. To the contrary, Mr. Spellings testified that in drawing the plan, when he got to certain urban areas and it was necessary to split counties, he relied on the Legislative Council as to how to do it since they had helped prepare the prior plan. 8 App. 2249. And Mr. Johnson of the Legislative Council unequivocally testified that in supplying suggestions to Spellings, he used portions of the prior plan that had escaped criticism in *Smith* v. *Craddick*. 6 App. 1878. This, of course, is the practice, frequently indulged in by Appellees, of attributing to the Board as a whole the action or thought-processes of a single member or staff member.

catalog of these unsupported statements. Instead, the purpose of this brief is to identify and reply to the primary legal arguments advanced by Appellees.[2]

I.

THIS COURT HAS JURISDICTION OF THIS APPEAL UNDER 28 U.S.C. § 1253; THE THREE-JUDGE COURT BELOW WAS PROPERLY CONVENED; AND THE ORDER REDISTRICTING BEXAR AND DALLAS COUNTIES HAS A STATEWIDE IMPACT

Appellees contend that this Court lacks jurisdiction under 28 U.S.C. § 1253,[3] citing primarily *Skolnick* v. *Board of Commissioners,* 389 U.S. 26 (1967); *Board of Regents* v. *New Left Education Project,* 404 U.S. 541 (1972); *Gunn* v. *University Committee to End the War,* 399 U.S. 383 (1970); *Ruckelshaus* v. *Chavis,* 403 U.S. 914 (1971); and *Whitcomb* v. *Chavis,* 403 U.S. 124, 138, n.19 (1971).[4] There are actually two separate jurisdictional questions: (1) Does this Court have jurisdiction to consider the redistricting of Bexar County and Dallas County into single-member districts? and (2) Does this Court have jurisdiction to consider the judgment of the Court below that the redistricting plan for the entire State for the Texas House of Representatives violates the Equal Protection Clause of the Fourteenth Amendment? These two questions will be considered separately.

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[2] For convenience, when this brief refers to certain arguments having been made by "the Appellees", Appellant merely means that one or more, but not necessarily all, of the Appellees have made the same. Where pertinent, the particular party making the assertion is identified by reference to that party's brief.

[3] Appellants did not argue the jurisdictional issue in their original brief, as this Court noted probable jurisdiction on October 10, 1972, in spite of the fact that the appellees had urged the Court to dismiss for lack of jurisdiction.

[4] Willeford Brief at 40-45; Regester Brief at .....

A. This Court Has Jurisdiction to Consider the Appeal from the Injunction Ordering Single-Member Districts for Bexar County and Dallas County.

1. *Appellees incorrectly state the law.*

Appellees' arguments, simply stated, are that the order of the court below redistricting Bexar County and Dallas County into single-member districts was of only "local" as opposed to "statewide" impact, and that, even though the three-judge court was properly convened, this Court lacks jurisdiction if the *order* of the three-judge court has less than "statewide" impact.[5] In this regard appellees rely primarily upon *Board of Regents* v. *New Left Education Project, supra.*[6] There the Court ruled that a three-judge court had been improperly convened, because the challenged rules of the Board of Regents applied only on the campuses of three of the twenty-three four-year State colleges and universities of the State of Texas, and were therefore "local" rather than "statewide" regulations. 404 U.S. at 543-44. The Court relied upon *Moody* v. *Flowers,* 387 U.S. 97 (1967), where it was held that a three-judge court was improperly convened to consider the districting scheme for electing members of the Houston, Alabama, County Board of Revenue and Control. In *Moody* v. *Flowers,* this Court stated the rule defining its jurisdiction under 28 U.S.C. § 1253 as follows:

> "This Court has jurisdiction of these direct appeals under 28 U.S.C. § 1253 only if the respective actions were 'required . . . to be heard and determined by a district court of three judges.' Section 2281 of 28 U.S.C. requires that a three-judge court be convened in any case in which a preliminary or permanent injunction

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[5] Willeford Brief at 42-43.

[6] *Ibid;* Regester Brief at .....

is sought to restrain 'the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute. . . .' The purpose of § 2281 is 'to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order' (Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154, 9 L.Ed.2d 644, 652, 83 S.Ct.554), and to provide 'procedural protection against an improvident statewide doom by a federal court of a state's legislative policy.' Phillips v. United States, 312 U.S. 246, 251, 85 L.Ed.2d 800, 805, 61 S.Ct. 480. In order for § 2281 to come into play the plaintiffs must seek to enjoin state statutes 'by whatever method they may be adopted, to which a State gives her sanction. . . .' American Federation of Labor v. Watson, 327 U.S. 582, 592-593, 90 L.Ed. 873, 880, 66 S.Ct. 761.

"The Court has consistently construed the section as authorizing a three-judge court not merely because a state statute is involved but only when a state statute of general and statewide application is sought to be enjoined." 387 U.S. at 101.

The Republican Appellees contend that, under the rationale of *Moody* v. *Flowers,* even though they and the other plaintiffs *challenged* the entire State redistricting scheme embodied in a statute of general and statewide application,[7] the *order* of a three-judge court determines jurisdiction in this Court, and that an order that has "local" rather than

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[7] Plaintiff Curtis Graves moved to sever his case on grounds that he had challenged only senatorial districting of Harris County, and asserted that the convening of a three-judge court was improper. The court denied Graves' motion, saying: "we conclude that the plaintiff is challenging a state statute of general application throughout the state and is then seeking to *remedy* by injunction one county's apportionment scheme." (A.Jur.S. at 7A) (emphasis is the court's).

"statewide" *impact* will not sustain this Court's jurisdiction.[8]

Appellees confuse the requirements of two separate and distinct jurisdictional statutes. The propriety of convening a three-judge court is determined by 28 U.S. § 2281;[9] the jurisdiction of the Supreme Court of a direct appeal is determined by 28 U.S.C. § 1253,[10] which allows a direct appeal "from an order granting or denying . . . an injunction" in a case that must be heard by a three-judge court. This Court has jurisdiction if (1) a three-judge court was properly convened and (2) the appealing party was either enjoined or was denied injunctive relief.

Appellees erroneously argue that the State may not appeal from an injunction whose *impact* is local, without regard to the issue of whether a three-judge court was properly convened. Appellees' error is demonstrated by their misplaced reliance on *Skolnick* v. *Board of Commissioners,* 389 U.S. 26 (1967), which Appellee Willeford discusses as follows:

> "That this Court has no jurisdiction when the order of the District Court has only local impact was re-

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[8] Willeford Brief at 42-43.

[9] 28 U.S.C. § 2281 states that: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[10] 28 U.S.C. § 1253 states that: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

affirmed in *Skolnick* v. *Board of Commissioners,* 389 U.S. 26 (1967). In that case an appeal was taken from an order by a three-judge court denying an injunction of that portion of a statewide judicial apportionment that affected Cook County, Illinois. See *Skolnick* v. *Kerner,* 260 F.Supp. 318 (N.D. Ill. 1966). The claim in the lower court was that the scheme debased the votes of racial and religious minorities in Cook County. The three-judge court denied relief; on appeal this Court vacated and remanded the order of the lower court, citing *Moody* v. *Flowers.*"[11]

In fact, there were two completely separate *Skolnick* cases. *Skolnick* v. *Kerner,* 260 F.Supp. 318 (N.D. Ill. 1966), did involve a challenge to the Cook County, Illinois portion of a state-wide judicial districting scheme. This Court did *not,* as in *Moody* v. *Flowers,* vacate the order of the district court and remand for entry of a fresh decree to allow appeal to the court of appeals, but instead, without referring to *Moody* v. *Flowers,* merely stated in a *per curiam* opinion that "[t]he motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question." *Skolnick* v. *Kerner,* 387 U.S. 91 (1967).

The second *Skolnick* case, as revealed in the opinion of the Seventh Circuit following the appeal of that second case to this Court, involved a separate and distinct challenge to the districting of Cook County, Illinois for election of the members of the Cook County Board of Commissioners.[12] This second *Skolnick* case had been brought before a three-judge court that was *improperly convened,*

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[11] Willeford Brief at 43.

[12] The district court opinion in the second *Skolnick* case was apparently unreported as there is no citation to the district court opinion in either this Court's opinion, *Skolnick* v. *Board of Commissioners,* 389 U.S. 26 (1967), or in the subsequent opinion of the Court of Appeals, *Skolnick* v. *Board of Commissioners,* 435 F.2d 361 (7th Cir. 1970).

as it involved, just as did *Moody* v. *Flowers, supra,* a challenge to the districting of a *local* governing board. It was this second, *local Skolnick* case in which the Supreme Court held that it had no jurisdiction of the appeal:

> "The judgment of the District Court is vacated and the cause is remanded in order that the District Court may enter a fresh decree from which appellant may, if he wishes, perfect a timely appeal to the Court of Appeals. Moody v. Flowers, 387 U.S. 97, 18 L.Ed. 2d 643, 87 S.Ct. 1544." *Skolnick* v. *Board of Commissioners,* 389 U.S. 26 (1967) (per curiam).

The remainder of the cases cited by the Appellees as supporting a lack of jurisdiction may be divided into two categories: (1) those holding that a three-judge court was improperly convened because the pleadings failed to challenge a statute or regulation of statewide application[13] and (2) those holding that this Court has no jurisdiction where the three-judge court did not enter an order either enjoining or denying injunctive relief to the appellant.[14]

The three-judge court here was properly convened (Appellees do not, and cannot, argue otherwise; their challenge was of a statute of statewide application, redistricting the entire State of Texas, and was additionally an expression of State policy), and the three-judge court did enter an injunction against Appellants. This Court therefore has jurisdiction with regard to the ruling concerning Dallas and Bexar Counties under 28 U.S.C. § 1253.

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[13] *Board of Regents* v. *New Left Education Project,* 404 U.S. 541 (1972); *Hutcherson* v. *Lehtin,* 399 U.S. 522 (1970).

[14] *Whitcomb* v. *Chavis,* 403 U.S. 914 (1971); *Bolton* v. *Doe,* 402 U.S. 936 (1971); *Smith* v. *Garza,* 401 U.S. 1006 (1971); *McCann* v. *Babbitz,* 400 U.S. 1 (1970); *Gunn* v. *University Committee To End the War,* 399 U.S. 383 (1970); *Dial* v. *Fontaine,* 399 U.S. 521 (1970); and *Mitchell* v. *Donovan,* 398 U.S. 427 (1970).

2. *The injunction ordering redistricting of Dallas and Bexar Counties has a "statewide impact."*

Though Appellees are in error in contending that the propriety of convening a three-judge court depends on the scope of the relief granted rather than the scope of the relief sought, this Court would have jurisdiction even if Appellees were correct: the injunction ordering the redistricting of Bexar and Dallas Counties has a "statewide" impact. The officials who would have been elected in Bexar and Dallas Counties under the challenged districting plan would have been State legislators and would have comprised approximately one-fifth of the total membership of the State House of Representatives.

The officials elected under the challenged districting scheme in *Moody* v. *Flowers, supra,* were clearly merely county officials whose powers were limited to the area of Houston County, Alabama.[15] *Moody* v. *Flowers* is therefore distinguishable from the instant case, which concerns the validity of a Statewide districting enactment of the Legislative Redistricting Board (hereinafter the "Board"), a quasi-legislative entity established by the Constitution of the State of Texas, Article III, Section 28 (A. Jur. S. 175E-176E), and authorized to redistrict the entire State of Texas upon failure of the State Legislature to enact a valid redistricting staute. The actions of the court below, in striking down the enactment of the Board, radically changed the manner of electing Representatives to the House of Representatives of the Texas Legislature from Dallas and Bexar Counties, which contain, respectively, populations of

[15] "[T]he constitutional attack was directed to a state statute dealing with matters of local concern — the apportionment and districting for one county's governing board. The statute is not a statute of statewide application, but relates solely to the affairs of one county in the State." Moody v. Flowers, 387 U.S. 97, 102 (1967).

1,327,000 people and 830,000 people, electing eighteen and eleven representatives respectively. It cannot be questioned that legislators elected from Bexar and Dallas Counties are State officials, not county officials as in *Moody* v. *Flowers*, and that their powers extend to the entire State of Texas. Any change in the manner by which these State officials are elected therefore must, of necessity, have a "statewide impact." Dallas and Bexar Counties together elect twenty-nine out of the 150 members of the Texas House of Representatives. Changing the manner of election of these representatives therefore must unavoidably have a significant impact on the composition of the lower house of the Texas Legislature, and undoubtedly has an effect on the entire State.[16]

B. This Court has Jurisdiction of the Declaratory Portions of the Judgment of the Court Below Under the Pendent Jurisdiction of This Court.

It need not be decided whether, under current case law, this Court would have jurisdiction of this appeal had the court below granted Appellees no injunctive relief. See, *e.g.*, *Whitcomb* v. *Chavis*, 403 U.S. 914 (1971). The court below having granted injunctive relief, and this Court having jurisdiction over the portion of the case relating to the ordered single-member districts for Bexar County and Dallas County, this Court should also consider the declaratory portion of the order of the court below under the pendent jurisdiction of this Court, because the

[16] If Appellees' argument were carried to its logical conclusion, a three-judge court would never be required to pass on the constitutionality of a state redistricting plan as long as the plan contained at least some ideal districts so that any court-imposed redistricting would extend to less than the entire state and, according to Appellees' point of view, would have less than statewide impact.

findings of the court below that the State had failed to follow a rational plan in redistricting involved both the multi-member district/single-member district issue and the issue of mathematical equality of the populations of the various districts.

It is clear from a reading of the opinion of the court below and from a reading of Appellees' briefs that the decision below was predicated upon a dislike by the court for the procedures of the Board. The court and the Appellees have decided that the actions of the Board do not constitute a rational state policy because of (1) the frequency of Board meetings, (2) the directions given by the Board to its staff, (3) the extent to which staff members made decisions that were ultimately approved by the Board, and (4) the method by which the recommendations of the staff members were adopted and enacted into law by the Board. See Willeford Brief at 4-5, 16-17, 28-31, 34, 36; Bernal Brief at 5-8, 15-17; Regester Brief at 2-3, 4-6. As it was these inquiries into the Board's procedures that were used to determine a lack of a rational State policy, as a basis for both the injunctive and the declaratory relief granted, this Court should decide the entire case at one time, avoiding piecemeal appeals and unnecessary expense to both the appellees and the State of Texas.

This Court recently noted the propriety of exercising its pendent jurisdiction to hear an entire matter under circumstances where a portion of the matter is properly before this Court under 28 U.S.C. § 1253. In *Roe* v. *Wade*, 41 U.S.L.W. 4213, 4216 (January 22, 1973), Mr. Justice Blackmun, in delivering the opinion of the Court, observed that:

> "Our decisions in Mitchell v. Donovan, 398 U.S. 427 (1970), and Gunn v. University Committee, 399 U.S.

> 383 (1970) are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under § 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See Carter v. Jury Commission, 396 U.S. 320 (1970); Florida Lime and Avocado Growers, Inc. v. Jacobson, 362 U.S. 73, 80-81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise."[17]

It is clear from the opinion of the court below that the arguments as to both the use of multi-member districts and the failure to achieve mathematical equality among legislative districts are essentially the same, *i.e.*, that the State failed to act in a rational manner, and more particularly, that the Board failed to act pursuant to a rational state policy and that its deliberations were not such as to justify judicial abstinence. An examination of the opinion of the court below makes clear that it commingled the multi-member district issue with the population equality issue.[18]

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[17] *Roe* v. *Wade* involved the plaintiffs' appeal from denial of injunctive relief and the defendant's attempted appeal from the grant of declaratory relief. Here it is the same party aggrieved by both the declaratory and injunctive aspects of the three-judge court's order. Here, unlike in *Perez* v. *Ledesma*, 401 U.S. 82 (1971), the issue is whether this Court has jurisdiction to determine all challenges directed at a single statewide statute where it clearly has jurisdiction to review those challenges resulting in injunctive relief. As this Court held in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 80 (1960), "in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has — just as we have on direct appeal from its action — jurisdiction over *all* claims raised against the statute." (emphasis this Court's).

[18] A. Jur. S. at 19A-21A.

Indeed, it appears that, central to the decision of the court below, and emphasized in the briefs of all of the appellees here, is the premise that the Legislative Redistricting Board (1) is not the legislature (and that the redistricting plan is not entitled to the same consideration by the Court as it would be entitled to had it been drawn by the legislature),[19] and (2) acted in an arbitrary and irresponsible manner, so that the redistricting plan established by the Board is not entitled to consideration by this Court as a rational state policy.[20] In the interest of fairness to the parties and of judicial economy, this Court should consider both the order of the court redistricting Bexar and Dallas Counties into single-member districts and the declaratory judgment of the court that the entire plan for the State of Texas is unconstitutional. To do otherwise will require the litigants to litigate the same issue, *i.e.*, the rationality of the actions of the Legislative Redistricting Board, in both this Court and in either the United States Court of Appeals for the Fifth Circuit, in the event that the declaratory aspects of this appeal are dismissed and the Court vacates and remands the same to the district court for entry of a fresh decree, as is the usual practice, or in a subsequent appeal to this Court after the entry of an injunction by the court below, should the Legislature not act or should any plan adopted by it not satisfy the three judges of that court.

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[19] A. Jur. S. at 19A-20A.

[20] A. Jur. S. at 14A, 19A-21A; Willeford Brief at 4-5, 16-17, 28-31, 34-36; Regester Brief at 2-4, 4-6; Bernal Brief at 5-8, 14-17; Amicus Brief at 9-14.

II.

THE COURT BELOW IMPROPERLY BASED ITS DECISION ON THE PROCEDURES BY WHICH THE LEGISLATIVE REDISTRICTING BOARD ADOPTED THE DISTRICTING PLAN, RATHER THAN BY FAIRLY EVALUATING THE PLAN ON ITS OWN MERITS.

It is clear from a reading of the opinion of the court below that it proceeded under a presumption that the redistricting plan was invalid, or at least very suspect, solely because of the procedures that the court found to have been employed by the Legislative Redistricting Board in adopting the plan. (A.Jur.S. 14A, 19A-21A, 31A) The opinion below was only secondarily based upon a consideration of the *effect* of the plan. (A.Jur.S. 42A) This concern with procedure rather than substance was involved both in the court's ruling on the single-member/multi-member district issue and in its ruling on the one man-one vote equal protection issue. Bound up with the court's concern with the procedures of the Board was its apparent opinion that the Board's redistricting plan was not entitled to the same presumption of validity that would attach to a redistricting statute enacted by the Legislature, and the court below candidly stated its views in this regard. (A. Jur.S. 19A-20A)

The court fails to explain why it feels that the official acts of the Board, composed of five of Texas' highest elected officials, are not to be accorded the same consideration as would be the official acts of the State Legislature. Indeed, the court cites no authority at all in support of its bizarre position. Appellees supply none. Further, the court below held that the plan is not presumptively valid, because the Board initially declined to redistrict the Texas House of Representatives (the Board believed that it

lacked jurisdiction to do so, as the Legislature had enacted a redistricting statute for the lower house), saying:

> "First, whatever 'tolerance' might conceivably attach to a State's explanation of deviations from a population ideal cannot reasonably or appropriately attach to the actions of a redistricting board which acted on the House of Representatives' plan only pursuant to a mandamus, *Mauzy* v. *Redistricting Board, supra,* and which proceeded to draw its conclusions in the manner just sketched." (A.Jur.S. at 21A)

Finally, the court summarized its disdain for the procedures followed by the Board, as it concluded:

> ". . . We have serious doubts that this board did the sort of deliberative job contemplated by *Reynolds* as worthy of judicial abstinence." (A.Jur.S. at 21A)

The court below based its characterization of the Board's "job" largely upon such minutiae as (1) the number of meetings of the Board, (2) the number of public hearings held by the Board, (3) the amount of responsibility delegated to the Board staff, (4) the extent to which staff recommendations were adopted by the Board, (5) a lack of "legislative guidance", (6) a lack of debate of the single-member/multi-member district issue, (7) the number of members of the Board who signed the plan,[21] and (8) an

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[21] The court below and the Appellees in their briefs erroneously leave the impression that the House plan was signed by only three members of the Board. While it is true that only Martin, Calvert, and Barnes signed *both* the House and Senate plans, Armstrong signed the House plan along with the other three (6 App. 1851-52). In any event, even if three instead of four members had signed the House plan, that was all that was required under Article III, Section 28 of the Texas Constitution, and the plan is not subject to criticism for that reason any more than would an Act of Congress because it had been passed by only a bare majority.

alleged lack of standards by which the legislative district lines were drawn. (A.Jur.S. 14A, 20A)

The court below even suggests that the Board erred in relying on testimony and communications from Harris County indicating a preference for single-member districts, saying:

> "[i]t appears to this Court that if a State elects to use the 'wishes of the people' to treat metropolitan areas differently and unequally, then it is under some obligation to do a more thorough job of investigating the real 'wishes of the people' than was done by the Redistricting Board." (A.Jur.S. at 31A)

In short, as was pointed out in Judge Wood's dissent (A.Jur.S. at 102A-103A), the court strayed far into a consideration of the mechanics by which the plan was produced, rather than concerning itself only with the plan, its effects and the intentions of those who drew and adopted it.[22]

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[22] While the record in this case illustrates the difficulty of divining the mental processes of a legislative body, its members and staff, it is clear that all hands involved here, whatever their disagreements as to the means, aimed for and intended one end: a fair plan with precise population equality. Martin instructed the staff to hold the "percent of deviation to zero, if possible." (6 App. 1596). Mutcher thought that "evenness in numbers of people represented" was "the number one feature." (8 App. 2403). Barnes instructed staff member Spellings to get "the most constitutional map that we could." (8 App. 2229). Staff member Johnson testified that "a prime consideration was population, or the consideration to try to hit it as closely as possible . . . ." (6 App. 1878). One of the Appellees suggests that a brief comment made by Mr. Calvert during his deposition indicates that the Board was seeking something less than perfection. Willeford Brief 36. After Mr. Calvert testified that in his consideration of a redistricting plan he attempted "to make these districts as nearly equal as you could in regards to population" and that he was "guided, then, with simply making them as near equal as you could by the facts supplied by the people that had the information," (7 App. 1977), he did state that when the final

The emphasis of the court below on the procedures of the Board raises grave and fundamental questions concerning the nature of federalism. No federal court would for a moment consider declaring an Act of Congress invalid on the grounds that the House or Senate committee in which the legislation had been drafted had allowed the committee staff to do most of the actual drafting of the bill, nor would an Act of Congress be invalidated on the grounds that there had not been adequate debate on the floor of the House or Senate, nor even that the legislation was unwise. Yet the court below engaged in just those sorts of inquiries. If it is legitimate for a federal court to invalidate, on procedural grounds, a redistricting plan duly enacted by a legislative body, in accordance with the Texas Constitution, it can be no less legitimate for a federal court to invalidate other acts of the state legislatures on the same sorts of procedural grounds.

Yet, it is well established that the federal courts will not inquire into the method by which facially constitutional legislation has been enacted. *E.g., Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810); *Holt* v. *City of Richmond,* 459 F.2d 1093, 1098-99 (4th Cir. 1972), *cert. denied,* 92 S.Ct. 2510; *c. f. Bush* v. *Martin,* 251 F.Supp. 484, 515 (S.D.Tex. 1966). This Court has also recently reaffirmed the well-established

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plan and deviation figures were presented to him on the day that the plan was adopted:

> "I looked at the figures, and as I recall they weren't too far off or they may have varied. What was a 5% — It was not supposed to be more than 5% off of the average, whatever it was. Some districts were a little above it and some were a little below." (7 App. 1978)

Placed in its proper context, it is difficult to find in the above remarks by one Board member, a clue that would lead one to conclude that either the Board as a whole or Mr. Calvert himself started out aiming for some *de minimus* range of deviations. Having relied upon the Attorney General's instructing the staff to come up with a constitutional plan, Mr. Calvert was simply willing to approve a final product that had some minor deviations.

rule that it will not inquire into the wisdom of legislative enactments. In *James* v. *Strange,* 407 U.S. 128, ..., 92 S.Ct. 2027, ... 32 L.Ed.2d 600, 606 (1972), this Court held that:

> "We do not inquire whether this statute is wise, or desirable or 'whether it is based on assumptions scientifically substantiated.' Roth v. United States, 354 U.S. 476 (1957) (Harlan, J., concurring). Misguided laws may nonetheless be constitutional."

Perhaps in recognition that it could not legitimately base its opinion upon a procedural inquiry into the legislative process, the court below asserted that the redistricting plan was not legislation, saying "[t]he plan before the Court was not a product of legislative action, but of the action of a board of five members, only one of whom is a member of the legislature." (A.Jur.S. 19A-20A) The question of whether the Legislature Redistricting Board is a "legislative" body is, of course, not answered by inquiring whether its members are also members of the state legislature. The Board is a creature of the Texas Constitution and is endowed with legislative powers. The only function of the Board is to redistrict the State of Texas, and this power devolves upon the Board only upon failure of the Texas Legislature to enact a re-apportionment statute at its first regular session following publication of the decennial census. Tex. Const. art. III, § 28 (A.Jur.S. 175E-176E). The only function of the Board is therefore to carry out one of the duties of the Texas Legislature when the legislature has failed to act. Functionally, therefore, as the Board acts in place of the Texas Legislature, it is performing a "legislative" function and is a "legislative body" by the terms of the Texas Constitution.

Moreover, the enactments of the Board, when "executed [by three or more members of the Board] and filed with the

[Texas] Secretary of State, shall have the force and effect of law." (A.Jur.S. 176E) The enactments of the Board being "law", the Board is a law-maker, or "legislative body". The court below erred in holding otherwise, and its inquiries into the wisdom and fairness of the Board's procedures were also error.

However, even if the court below were correct in considering the procedures by which the plan was produced, its conclusion that the Board did not do a "deliberate job" "worthy of judicial abstinence" (A.Jur.S. 21A) is not supported by the record.

First, the court found a lack of coordination (or "tandem of operations") and a lack of Board guidance of the staff in regard to both constitutional principles and "lesser policy guidelines." (A.Jur.S. 20A) In fact, the late Attorney General, Crawford Martin, made a point of informing the other members of the Board and the Board staff of both (1) constitutional guidelines (including *Whitcomb* v. *Chavis*) and (2) scholarly legal articles dealing with redistricting. (6 App. 1580-81, 1645, 1660-61, 1696-97) In his dual role as Board chairman and legal counsel, Martin also instructed the Board staff to attempt to achieve zero population deviation and to follow the law, as declared by the various redistricting decisions of this Court. (6 App. 1595-96) Rather than providing the staff with no guidance, as the court below found, the Board, through Chairman Martin, maintained liaison with the staff; Martin personally examined partially completed maps of district lines and approved of the crossing of county lines in instances where this became necessary. (6 App. 1597) Martin also instructed the staff to watch for the possible dilution of minority group voting strength. (6 App. 1645-46) Martin personally had conversations with staff member Potter, and Martin's Assistant Attorneys General had conversations with staff

member Spellings and others, to insure that the staff members who drew the redistricting plan understood the principles announced by this Court in previous apportionment cases. (6 App. 1700-01)

Robert Johnson, the Executive Director of the Texas Legislative Council, testified that the Attorney General's staff advised the Board staff that (1) a "prime consideration" was to attempt to achieve precise mathematical equality and (2) crossing of county lines should be kept to a minimum. (6 App. 1878-79)

Staff member Spellings, who drew most of the House redistricting plan, is a licensed attorney, and testified that he was familar with the redistricting opinions written by this Court. (8 App. 2229-30) Spellings, who was employed as an Executive Assistant to Lt. Governor Barnes, a member of the Board, received instructions from Barnes to draw a redistricting plan and to use single-member districts only in Harris County. (8 App. 2227-28) Spellings further testified that Lt. Gov. Barnes wanted him to "draw the most constitutional map that we could." (8 App. 2229)

Secondly, the court below found that "[t]here is ample testimony that the Board was given absolutely no legislative guidance, nor did the Board begin from the legislative discussions that accompanied the earlier apportionment plans for Texas." (A.Jur.S. 20A) The Board, as a quasi-legislative body empowered by the Texas Constitution to enact a redistricting statute into law, is burdened by no legal duty to seek "legislative guidance." The Board was clearly not burdened by any duty to defer to the views of the legislature. The independent nature of the powers of the Board were recently and authoritatively construed by

the Texas Supreme Court in *Mauzy* v. *Legislative Redistricting Board,* 471 S.W.2d 570, 575 (Tex. 1971) (A.Jur.S. 193F), where the Court refused to issue a mandamus requiring the Board to use only single-member districts, saying:

> "The manner in which the Board apportions the state into new districts is *entirely within the judgment and discretion of the Board,* so long as it acts within the limitations imposed by the Constitutions of the State of Texas and of the United States."

Moreover, while the Board was under no duty to follow the apportionment plan previously enacted by the Legislature, neither did the Board completely disregard the Legislature's efforts nor ignore the information which the Legislature had complied, as the court below seems to have implied in its opinion. For example, the Board staff made substantial use of information compiled by the Texas Legislative Council for the use of the Legislature, and even adopted portions of the plan that the Legislature had earlier enacted. (8 App. 2249-50)[23]

The Texas Legislative Council, headed by Executive Director Robert Johnson, provided staff support for the Board, and coordinated its efforts with those of Robert Spellings, who actually drew much of the House plan, and with Attorney General Martin and his staff. Johnson testified that three members of the staff of the Legislative Council, including Assistant Director John Potter, assisted in

[23] The testimony of the Board members is replete with instances of them having sought out and obtained the proposals and viewpoints of numerous legislators. Many legislators appeared before the Board during its public hearings, many had submitted plans to the Board, many had communications with individual Board members, and the Board knew from the prior plan, struck down in *Smith* v. *Craddick,* what the majority of the Legislature wanted.

drafting the House plan. (6 App. 1872, 1875-76) The Legislative Council prepared a number of plans at the request of the Board, prior to preparation of the final plan. (6 App. 1881) A Board member instructed Johnson and the Legislative Council that single-member districts were to be used in Harris County. The statistical information that had been gathered for the use of the Legislature was made available to the Board and its members. (6 App. 1877-78) Statistical information that had been gathered by the Senate Redistricting Committee was also made available to the Board staff. (8 App. 2231)

Finally, the Senate Committee on Congressional, Judicial, and Legislative Districting and its staff provided assistance to the Board after the close of the regular session of the legislature, and provided census information and other data to the members of the Board. (8 App. 2454, 2458-59)

Thirdly, the court below found that the "committee [Board] met for hearings only four times" and "[t]he full board did not even meet to approve the final plan; it was merely passed around." (A.Jur.S. at 20A) In fact, Attorney General Martin testified that the Board met formally five or six times in *public* meetings. (6 App. 1569-70) Although there were no "private *meetings*" of the Board (Art. III, Section 28 of the Texas Constitution requires the presence of three members of the Board for a quorum), there were *numerous* "meetings," "conferences," or "conversations" between both various combinations of Board members and between various Board members and the Board staff. Although not technically "Board meetings," these informal conferences occurred with great frequency, and it was in these conferences that much of the Board members' deliberations were carried out. (6 App. 1578-79, 1589, 1602) The Board members also received and con-

sidered correspondence, telegrams, proposed redistricting maps, and presentations by various interested citizens, in addition to the testimony presented at the four formal hearings. (6 App 1571-72, 1577, 1586) The Board also received proposed redistricting maps from twenty-three State Representatives. (6 App. 1574-76)

III.

THE STATE HAS MET ITS BURDEN OF JUSTIFYING THE POPULATION DEVIATIONS.

Appellants have argued that in the absence of evidence of bad faith — and to the contrary, where the evidence is clear that the redistricting authority was aiming for precise mathematical equality — the State should not have the burden of having to justify each and every departure from absolute mathematical equality, particularly where the State has made a conscientious and good faith effort to comply with (1) its own state constitutional mandates as to contiguity and the preservation of county lines and (2) its legitimate concern for compactness and community of interest.[24] The Appellees have taken the position that it is arithmetic alone — the fact of deviation — which places the burden on the State to explain each and every deviation on the basis of a rational state policy consistently applied. Some of the Appellees devote a considerable portion of their briefs to cataloging the instances where deviations are said to be most flagrant and where the state policy of preserving county lines is said to have been violated. In most instances, the Appellees do not suggest

[24] The testimony of the Board members and staff members makes it abundantly clear that in addition to population equality and the preservation of county lines, compactness, contiguity, and community of interest were also criteria applied in preparing the plan. (8 App. 2230, 2404-05).

how they would have drawn districts differently. The examples which they now cite and challenge the State to explain, apart from Dallas and Bexar Counties, were not explored during the depositions they took of the members and staff of the Legislative Redistricting Board or during trial, and indeed, near the conclusion of the trial, the court below, noting that there had been no testimony as to the population deviation, questioned counsel for one of the Appellees as to whether the latter were attacking the plan on the basis of population deviation. (4 App. 1182). Said counsel responded that such a challenge was being made and that the evidence consisted simply and solely of arithmetic. (*Id.* at 1183). Thus, though Appellees now point to specific counties and districts which they claim the State failed to explain, they did not do this during the trial of the case but instead rested on the fact of deviation alone as requiring the State to explain each and every instance thereof.

It is Appellants' position that no such burden should be placed on the State where the deviations are as small as they are in the Board's plan and where the largest deviations are clearly explained by the Board's attempt to comply with Article III, Section 26 of the Texas Constitution (A.Jur.S. 174E) as interpreted in *Smith* v. *Craddick* (A.Jur.S. 178F-185F). Appellees do not suggest that the Board was ever presented with a plan with smaller deviations and yet in compliance with the State Constitution. They do challenge Appelants' assertion that the plan adopted by the Board contained only one violation of Section 26 of the Texas Constitution.

Appellees persist, as did the court below, in misreading *Smith* v. *Craddick*. In that case, the Texas Supreme Court set out five requirements of Section 26:

"1. Section 26 requires that apportionment be by county and when two or more counties are required to make up a district of proper population, the district lines shall follow county boundaries and the counties shall be contiguous. A county not entitled to its own representative must be joined to contiguous counties so as to achieve a district with the population total entitled to one representative. . . .

• • •

"4. With the nullification of the dictate relative to use of the surplus population (less than enough for a district) of a county which already has one or more representatives allocated thereto, it becomes *permissible* to join a portion of that county (in which the surplus population reside and which is not included in another district within that county) with contiguous area of another county to form a district. *For example,* if a county has 100,000 population, and if a district of 75,000 population is formed wholly within that county, the *county* is given its district, and the area wherein the 25,000 live *may* be joined to a contiguous area.

"5. It is still required that a county receive the member or members to which that county's own population is entitled when the ideal district population is substantially equalled or is exceeded. No exception to this requirement is made by what is said in 4. above. . . ." (A.Jur.S. 182F-183F)

The court below held, and Appellees now insist, that requirement 4. enumerated by the Texas Supreme Court prohibits the surplus population of a county entitled to one or more representatives from being *split* between *two* districts. According to Appellees, the Texas Supreme Court held that the surplus population must go into one and only one district. To the contrary, the Texas Supreme Court did not suggest that requirement 4. which it enunciated had been violated by the plan before it although said plan

(Tex. Rev. Civ. Stat. Ann. art. 195a — 3 (Supp. 1972)). contained at least three instances where a county had been assigned one or more representatives and where that county's surplus population had been divided into *two* districts (*e.g.*, Brazoria County, Tarrant County, Bexar County). Instead, the Texas Supreme Court pointed to the fact that "[e]ighteen counties with less than 74,645 population were divided, and portions of each of those counties were placed in two or more districts" (a violation of requirement 1.) and "[a]lthough Grayson County has a population of 83,225, that *county* was not apportioned a representative as required by Section 26, but a portion of the county was placed in District 14 with Fannin County, and the remaining portion of Grayson was placed in District 60 with counties to the west" (a violation of requirement 5.). The Texas Supreme Court concluded that "Appellees proved conclusively that this statute fails to do what is required by the constitution in those respects discussed in paragraphs 1. and 5. above." (A.Jur.S. 184F).

Appellants respectfully suggest that the court below and the Appellees have misread *Smith* v. *Craddick*. If the Texas Supreme Court had felt that Section 26 prohibited splitting surplus population between two additional districts, it would certainly have pointed to the instances in the plan before it where that was done and would have stated that in that respect the plan attacked violated requirement 4. of Section 26. And if requirement 4. means what Appellants say it means, then the plan adopted by the Board fully complies with *Smith* v. *Craddick* with the one exception of Red River County. There are no instances where a county entitled to at least one representative was not given its own district but was split into two districts in violation of requirement 5., as had been the case of Grayson County in the prior plan. The only instance where a county not

entitled to its own representative was split rather than joined *in toto* with contiguous counties (pursuant to requirement 1.) was the case of Red River County. That departure from state policy was explained. See Appellants' Brief p. 5 n. 4.

When one keeps in mind the fact that Texas has 254 counties, that the Board came up with a plan that cut only 19 county lines (as opposed to 33 in the plan attacked in *Smith* v. *Craddick*) and in which only one county was divided in contravention of Section 26 (as opposed to 18 in the plan attacked in *Smith* v. *Craddick*), it is difficult to see how the Board could be accused of bad faith depredations against state policy. Of the 18 districts which the court below listed as having the largest deviations, 13 were comprised of two or more entire counties where the Board was clearly attempting to comply with requirement 1. laid down by the Texas Supreme Court in *Smith* v. *Craddick*. Of course, in addition to population equality, the desire to keep small counties intact was not the only criteria used by the Board. The record is clear that it also considered compactness, contiguity, and community of interest. Appellees' approach of looking to particular counties to demonstrate districts with plus and minus deviations existing side by side leaves the erroneous implication that isolated modifications could have been made to cure the disparities. The truth, however, is that any modifications made would necessarily affect the remainder of the plan and that, in redistricting into 150 districts a state as large as Texas, assuming the propriety of using its 254 counties as building blocks in the first instance, situations are encountered where surplus population must be joined to contiguous counties and where there are limited choices available. Appellants urge this Court to look at the map of Texas reproduced on page 133C of the Appendix to the Jurisdictional Statement where the Court can readily see that

almost all of the so-called "unexplained deviations" highlighted by the court below and by the Appellees occur in districts which border the state boundaries in East Texas (Districts 1-9, 3-4, 2-12-14, 5-7-8), in South Texas (Districts 59-51-50), and in far West Texas (Districts 71-72). Appellants do not suggest that in every case there were no alternatives to drawing lines in the manner in which the Board did. Certainly El Paso County could have been left intact creating a plus deviation of 3.7% rather than dividing it into two districts with minus deviations of .3% and 1.3%. The City of Lubbock could have been left intact and a district created which totally encircled it instead of dividing the County of Lubbock into two compact and contiguous districts, one with a plus deviation of 1.9% and another with a minus 1.1%. In the case of Bexar County, a decision had to be made as to whether to remove four census tracts to reduce the deviation of its 11-place multi-member district even though this meant increasing the deviation of an adjoining single-member district.[25] Appellees would require the State to explain in these instances why it deemed population equality more important than county integrity, compactness of territory more important than city integrity, and equality of representation in an 11-member district

[25] Mr. Spellings testified that the reason the four census tracts in question were removed from Bexar County and placed in a contiguous single-member district was because they were "rural areas" and have more of a "community of interest" with the adjoining district. (8 App. 2277). Indeed, one of the Appellees suggests that since the Board used census blocks (smaller building blocks than census tracts) in districting Jefferson County (Districts 5 and 8), the Board had very precise tools with which to reduce the deviations found in the plan. Bernal Brief 25. While it is not clear how the Board happened to have census block figures available for Jefferson County, the evidence is undisputed that the Board did not generally have available other census block figures. (6 App. at 1896). The unavailability of census block information readily explains the difficulty in achieving smaller deviations in the single member districts of Harris County in which the population of one census block frequently exceeds the population of entire counties elsewhere in the State.

more important that equality of representation in a single-member district. It is respectfully submitted that the rationality of what was done is apparent from what Appellees suggest could have been done. And the issue is whether the lines were drawn in a rational manner, not whether they could have been drawn in a more rational manner.

If population equality is the only criteria which a state may use in redistricting the legislature, then *Reynolds* v. *Sims* does not mean what it says. If the State is permitted to consider other rational policies (and we intentionally use the plural), then there will always be certain inconsistencies which cannot be explained on the basis of "rationales . . . applied systematically throughout the state." (A.Jur.S. 22A). The use of multiple rationales and criteria and the fact that no situation confronted by the redistrictor in drawing his map is precisely like anything confronted before, means that values must be balanced as to each particular situation and choices made as to which way to draw the line. To require the State to justify each and every choice would require either that there be no choice (other than the kind of computer to use) or that some method be devised to record the mental processes of the persons or groups drawing the lines. For even if the deviations were only fractions of percentage points, someone could always require the State to explain why a certain census block with a population of 12 was not put into one district rather than another.[26]

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[26] Indeed, one of the Appellees suggests that since census blocks (subdivisions of census tracts) were used in the redistricting of Jefferson County (Districts 5 and 8), the State of Texas had more precise tools than census tracts with which to achieve less deviation. (Bernal Brief at 25). Apart from Jefferson County, however, the undisputed testimony was that census block figures were not available to the staff of the Board. (6 App. 1896). The unavailability of census block data readily explains the much criticized deviations among the single-member districts of Harris County where census tracts, the smallest building blocks available to the Board, frequently contain more people than entire counties in many parts of Texas.

IV.

THE COMBINATION OF SINGLE-MEMBER LEGISLATIVE DISTRICTS IN HARRIS COUNTY AND MULTI-MEMBER LEGISLATIVE DISTRICTS IN OTHER METROPOLITAN AREAS DOES NOT DENY EQUAL PROTECTION.

Appellees seek to support the judgment of the court below on the ground that the apportionment plan, by implementing single-member districts in Houston and multi-member districts in the other metropolitan areas, without a "compelling state interest" for doing so, discriminates against candidates and political associations because the cost of running for office in a multi-member district is greater than the cost of running in a single-member district.[27]

A. The Differing Treatment of Harris County Was Not Found to be Unconstitutional by the Court Below.

The court below concluded as the bases for its decision "that the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote', and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and Bexar Counties are unconstitutional in that they dilute the votes of racial minorities." (A.Jur.S. 60A). The court devoted portions of Part I and the entirety of Part II of its opinion to the combination of single-member districts in Harris County and multi-member districts in other areas but concluded only that

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[27] The court below recognized, but ignored, that different treatment is not necessarily invidiously discriminatory treatment when it stated:

> "While the Fourteenth Amendment does not prohibit all unequal treatment of individuals or groups and does permit rough accommodations, it does prohibit 'invidious discrimination.'" (A.Jur.S. 26A).

because of the combination, "the use of multi-member districts in Texas cities *is subject to serious constitutional question* on the bases of the First Amendment, the Due Process clause and the Equal Protection clause." (A.Jur.S. 35A) (Emphasis added).[28] The court did not find the mix of multi-member and single-member districts in different metropolitan areas unconstitutional, but advised the State of Texas that such mix in the future would be subjected to close scrutiny by the court.

The court below first raised this point in Part I of the opinion in connection with its discussion of the population deviations. After concluding that the deviations required justification, and finding none acceptable to it, the court concluded that Texas had no rational state policy that "resulted in the population deviations previously discussed *and in the disparate treatments of metropolitan areas.*" (A.Jur.S. 19A).[29] The court pointed out that in *Kilgarlin*[30]

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[28] The court below began Part II of its opinion with the following language:

> "Because of our holding under *Reynolds*, we are not compelled to decide other questions raised by the plaintiffs pertaining to the entire State of Texas, although we do feel compelled to reach conclusions later in the opinion with regard to specific metropolitan areas [Dallas and Bexar Counties]."

Because of this obvious disclaimer regarding the court's recommendations concerning the use of multi-member districts, appellants did not raise this point in their Brief for Appellants except to the extent that the court's discussion of multi-member districts further evidences that it was not so much the plan that was faulted, but the method by which the plan was adopted.

[29] The court's description of the use of single-member districts in Harris County and multi-member districts in other counties escalated from "disparate" and "different" (A.Jur.S. 19A-21A), to "haphazard combination" and "irrationality" (A.Jur.S. 22A), to "different and unequal" and "disparate and unequal" (A.Jur.S. 35A), but never reached the point of "invidious discrimination."

[30] In the plan under consideration in *Kilgarlin*, Harris County had been subdivided into three multi-member districts which conformed to the three Congressional Districts within Harris County. Dallas County and the other metropolitan areas were county-wide multi-member districts.

the state had "assured" the court that the State's policy "limits the size of any multi-member district to fifteen Representatives", and in the current apportionment plan this "policy" was abandoned without explanation. Thus the combination became, in the opinion of the court, a "haphazard combination of single and multi-member districts"; and "irrationality" There after, the court proceeded to Part II of the opinion, repeating much the same reasoning as in Part I with regard to multi-member district and, as a guide for the Legislature in its court-directed apportionment effort, warned that the use of multi-member districts in Texas is subject to serious constitutional question. But the judgment below was based upon deviation as to the entire plan and dilution as to Dallas and Bexar Counties (unconstitutional effects on voters), not discrimination between Dallas and Harris Counties as to candidates

Appellants submit that in view of the gratuitous nature of the trial court's pronouncement and the speculative evidence on which it was based, this Court should not use this case as a vehicle for deciding whether a state must demonstrate a "compelling state interest" before it can constitutionally use both single- and multi-member districts in its legislative districting scheme

B. The Proper Test Is Whether There is a Rational Basis, Not a Compelling State Interest, For the Combination of Single- and Multi-Member Districts.

If this Court feels compelled to pass on the issue discussed here, Appellants submit that the decision of this Court in *Bullock* v. *Carter,* 405 U.S. 134, 92 S.Ct. 849 (1972), does not require Texas to demonstrate that it was "necessary" to use single-member districts in Harris County and multi-member districts in other metropolitan counties, but only that such mix was "not irrational." In assessing the

constitutionality of Texas' filing fees for primary elections, this Court in *Carter* held the State to a more rigid standard than that usually applied in Equal Protection cases involving restrictions on candidacy because the Court found that the filing fee system had "a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate . . ." 92 S.Ct. at 856. The filing fee system limited a candidate's access to the ballot and a voter's choice of candidates on the basis of wealth. It could unquestionably affect the outcome of particular elections where competing groups of voters in a given community had different financial resources. The alternative method of petitioning for a place on the ballot for the general election required abandonment of party affiliation.

The most obvious distinction between filing fees and multi-member districts is that the latter do not limit assess of candidates or choice of voters and the alternative of a candidate to not running at all (because of fear of campaign expense) is party affiliation and particularly running on a slate. There is admittedly, in any elective contest where campaigning is privately financed, a built-in bias against the poor. All things being equal, the candidate with more money has a better chance. Increasing the size (in terms of population or geography) of the district — be it single- or multi-member — amplifies the bias. But this bias is endemic in the present system of elections, and this Court has never intimated that multi-member or large single-member districts are invalid *per se,* or that a State must demonstrate a "compelling state interest" for using such districts. To the contrary, this Court has noted that "when the validity of the multi-member district, as such was squarely presented, we held that such a district is not *per se* illegal under the Equal Protection clause."

Whitcomb v. *Chavis,* 402 U.S. 124, 142 (1971). Moreover, this Court has consistently approved, and even suggested, the use of multi-member districts in combination with single-member districts. Indeed, in *Whitcomb,* this Court disapproved the lower court's failure to explain on supportable grounds why it did not create single-member districts in the Marion County ghetto and leave the county otherwise intact as a multi-member district.

The court below recognized that Texas did not have to demonstrate a "compeling state interest" for its use *vel non* of multi-member districts. Indeed, the trial court refused to hold that a State has the burden of justifying any and all combinations of multi-member and single-member districts. What the court found invidious was the use of multi-member districts in all metropolitan areas except Harris County: a discrimination between the candidates of Dallas County and the candidates of Harris County, one based on geography, not demography or wealth. It was the different treatment of candidates in Harris County and candidates in other metropolitan counties that the court required Texas to demonstrate was made necessary by a compelling state interest. *Bullock* v. *Carter* does not support this result. The distinction drawn by Texas is not between the rich and the poor. The distinction is between all candidates rich and poor alike, in Harris County and all candidates, rich and poor alike, in other metropolitan counties, candidates who in no event run against each other. Theoretically, a poor candidate in Houston may have a better chance than a candidate of equal resources in Dallas. But these two candidates are not running against each other, and the Dallas candidate's chance of winning is not improved by requiring that Houston be made a multi-member district. Any difference of treatment accorded candidates is based on where they live and not their financial resources. If the use of multi-

member districts in all metropolitan areas, or single-member districts in all metropolian areas, does not discriminate among candidates on the basis of wealth, then the use of multi-member districts in some areas and single-member districts in others is not a discrimination based on wealth. It is doubtful that multi-member districts have the same "real and appreciable impact on the exercise of the franchise" as do filing fees. But whatever impact they have, the mere combination of such districts in some communities with single-member districts in other communities does not cause such impact to be related to the resources of the voters supporting a particular candidate. Houston and Dallas are treated differently, but the difference, not being related to the financial resources of either's voters or candidates, need not be justified by a "compelling state interest." It is enough that the different treatment of different geographical areas not be irrational.

C. The State of Texas Has Demonstrated That the Use of Single-Member Districts in Harris County and Multi-Member Districts in Other Metropolitan Counties Was Not Irrational.

Texas had had a history of uniform use of multi-member districts in its urban areas (although Houston had been divided into three multi-member districts in 1966). In 1971 the Legislative Redistricting Board followed the lead of the Legislature and adopted a new, innovative single-member district plan for Harris County (Houston) in response to what the Board, in its wisdom and in the exercise of its discretion, understood to be the wishes of the citizens of Harris County and in reaction to the favorable response of the citizens to the previous system of three districts. The Board simultaneously, in response to what it understood to be the wishes of the people of other urban areas of Texas, retained the traditional multi-member districts for those areas. The court below held

this innovation to be a denial of equal protection to the citizens of Dallas and Bexar Counties, apparently wholly on the premise that these counties are urban areas similar to Houston and should therefore be treated in an identical manner to Houston. And since this Court has held that the use of multi-member districts is not *per se* invidious discrimination (*Whitcomb* v. *Chavis*), what the court below must have found objectionable was the innovative use of single-member districts in Harris County. The rationale of the court below apparently is that any innovation in legislative districting must be implemented simultaneously throughout a state or not implemented at all. It is further apparent that the court below will not allow any experimentation in the political process, and will regard any variations in approach as invidiously discriminatory.

The reasoning of the court below simply does not support its conclusion that the combination of single-member districts in Harris County and multi-member districts in other metropolitan areas constitutes unequal and discriminatory treatment, nor does the combination suggest a "lack of rationality," a "crazy quilt" or a "haphazard combination." The court below incorrectly analyzed and rejected the reasons why Texas chose to treat Harris County differently.

1. *The Former Fifteen Member Limitation in Size of Multi-Member Districts Was Not a "Policy" Binding Upon the State.*

Appellees find particular comfort in the court's repeated criticism of the State's "unexplained abandonment" of the "state policy" set forth in *Kilgarlin* wherein the defendants "assured" the three-judge court that the size of any multi-member district would be limited to fifteen Representatives and that any county that attained a population of a million

or more would be subdivided for Representative districts, upon which assurance the three-judge court relied in approving the "disparate" treatment between Harris and Dallas Counties in the 1965 apportionment bill.

Appellees and the court below *assume* that there was a "state policy," *assume* that "disparate" treatment was involved to an extent that justification was necessary, *assume* that defendants "assured" the court of this continuing plan, and *conclude,* therefore, that the State must now explain its abandonment of this plan. An examination of the underlying rationale for the limitation in size of multi-member districts in the apportionment plan under consideration in *Kilgarlin,* demonstrates that the limitation was a practical approach to effectuate the preference of the Committee that drafted the plan. The Committee felt that multi-member districts should be somewhat limited in size to accommodate voting machines. Harris County, the largest area to be multi-member districted, accommodated a limitation in that it had within its county lines, three Congressional districts which could be used as boundaries for multi-member legislative districts. The limitation was never offered as a "state policy," and there is no indication that the court in *Kilgarlin* was "assured" that the limitation would be continued in future apportionment plans.

The trial court in *Kilgarlin,*[31] in its discussion of the different treatment of Harris County, stated at 252 F.Supp. at 444:

> "The Legislature apportioned Harris County in this manner pursuant to the policy of H.B. 195 which limits the size of any multi-member district to fifteen Representatives.

[31] In *Kilgarlin,* the attack in this regard was by Harris County voters, claiming discrimination in that their districts were not as large as the district in Dallas.

"One very practical purpose of this latter limitation is to avoid overtaxing the capacity of the voting machines by limiting the size of a multi-member district to a reasonable population. The presence of more than fifteen names on a ballot would require the use of two machines to accommodate all of the candidates, and this result would increase enormously the expense of a general election in Texas. The policy will apply equally to all counties which attain a population of 1,000,000 or more, so this system is not an arbitrary discrimination toward Harris County. This is not an irrational state policy by any standard; and in the absence of substantial population disparity between these districts, the system is within the protective language of *Reynolds*, 377 U.S. at 579, 84 S.Ct. at 1391.

"For all of the reasons previously mentioned which justify the use of multi-member districts, plus the additional practical reason of limiting the load on the voting machines, this Court holds that House Bill 195 does not deny equal protection of the laws to these intervenors from Harris County."

Although the court termed the limitation a "policy," it was not presented as such. Apparently, the trial court relied upon Defendants' Trial Brief in this regard.[33] The Brief sets forth at page 26:

"Although Section 26 does not *require* that multiple representatives allotted to a single county be elected at large, formation of the county into a multi-member district has been the consistent pattern of apportionment throughout the history of the State. The first and only deviation from that pattern occurred in H.B. 195, when Harris County was divided into three representative districts coextensive with the three congressional districts. This also conformed to a pattern, and

[33] Defendants' Trial Brief, *William W. Kilgarlin* v. *Crawford Martin, et al*, Civil Action No. 63-H-390, In the United States District Court for the Southern District of Texas, Houston Division.

was based on reasonable, practical grounds as explained in the statement by Representative Mutscher which is Plaintiffs' Exhibit 1 attached to his deposition."

Digressing further to the origin of this "state policy," the reference in the Brief as to an exhibit reproducing an entry in the House Journal,[33] entitled "Remarks By The Honorable G. F. Mutscher Pertaining to House Bill No. 195," which provides in pertinent part:

"The committee decided that the traditional use of multi-member districts should be continued in the metropolitan areas. Your committee members reached this decision only after we tried to draw reasonable single-member districts in the metropolitan areas. Our attempts convinced us that the task, besides being quite complicated, was relatively useless. The only available population figures were from the 1960 census, which we found very inaccurate for the fast-growing areas of the cities. In addition, only rarely did the census tracts following a natural boundary or a well known boundary which could be easily identified by the people, and many of the 1960 census boundaries are no longer in existence because of the rapid road-building program under way in the large metropolitan areas. Furthermore, the house members from these districts could not agree on a plan for dividing the areas because most of these members felt that the fragmentation of the districts would decrease their strength in the legislature. All of these considerations led to committee to conclude that drawing single-member districts of approximately 64,000 people even in the large metropolitan areas would be hopeless and futile task.

"However, the committee did feel that too many places in a multi-member district could become as confusing to the voter as the single member districts. In order to avoid having an exceptionally long ballot or overtaxing the capacity of the voting machines, the com-

[33] Journal, Texas House of Representatives 3502-03 (May 31, 1965).

> mittee decided that it would be well advised to limit the number of places in each district to no more than 15. In this manner we hoped to avoid drawing a number of small, difficult to identify, meaningless areas and at the same time prevent a situation where there were so many candidates the voter could not make a rational choice.
>
> • • •
>
> Thus the large metropolitan counties were given representatives in proportion to their population by using the multi-member district system."

That the fifteen-member limitation was set forth in *Kilgarlin* as an explanation for the subdistricting of the Harris County multi-member district is apparent, but there is no indication from the three-judge trial court in *Kilgarlin* or from this Court that that particular part of the plan was left undisturbed in "reliance" upon this "compelling state interest." Indeed, the clear import of the quoted language is that the limitation was the result of "the feeling" of the House Committee on Congressional and Legislative Districts, a limitation that the Committee felt "well advised" to accept. The limitation as such was not enacted into law,[34] and surely the "feelings" of a Committee in one legislature is not a "policy" binding on subsequent legislatures. Since the limitation was never a "state policy," the "abandonment"[35] required no justification.

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[34] The plan under consideration in *Kilgarlin* was enacted into law, but it contains no reference to the limitation of multi-member districts to fifteen members. Tex.Rev.Civ.Stat.Ann. art. 195a.

[35] The court below further found that "Dallas County in 1971 fits all the elements of the *Kilgarlin* rationale for single-member districting, and yet Dallas remains a multi-member district. . . ." (A. Jur. § 34A). In fact, the *Kilgarlin* "rationale" did not even involve single-member districts, and if carried forward, would not have required single-member districting in Dallas County, but would have subdivided Dallas into multi-member districts of less than fifteen members.

Another "state policy" which the court below unnecessarily rejected was popular sentiment. Some of the members of the Board testified that the reason for single-member districts in Harris and multi-member districts in Dallas County was popular sentiment.[36] The court below found this reason to be "simply contradicted by the record" and even if true, an invalid reason based upon *Lucas* v. *Colorado General Assembly*, 377 U.S. 713 (1964). Of course, for the rationale of *Lucas* to be applicable, the scheme itself must first be constitutionally infirm, and given this infirmity, the fact that the scheme comports with majority preference is not sufficient to cure the infirmity. But here, the scheme itself is not unconstitutional, and thus *Lucas* is inapplicable. Even if this reasoning of some members of the Board is "contradicted by the record," the fact remains that, rightly or wrongly, the members acted, at least in part, on the basis of what they believed to be popular sentiment, and thus their action was rational, or at least not "completely irrational."

2. *The Differing Treatment of Harris County and the Other Metropolitan Areas Can Be Justified.*

Although the differing treatment does not require explanation, an explanation was offered by then Attorney General Crawford Martin, but principally ignored by the court below. Attorney General Martin testified that in the prior apportionment plan, Harris County had been treated differently from other metropolitan areas in that it was subdivided into three multi-member distrimts along the lines of its three Congressional districts. In 1971, however, the Congressional district lines no longer fell entirely within the county, and therefore to follow these Congressional

[36] Calvert Disposition, p. 13 (7 App. 1966); Martin Deposition, p. 31 (6 App. 1592).

lines again would have necessiated crossing county lines, in violation of the Texas Constitution. Thus, a change in the Harris County districting was necessary, and, with a history of having been subdivided, it was more rational to subdivide Harris County further into single-member districts than to return it to one county-wide multi-member district. (6 App. 1585-86)

The court below did not discuss this explanation directly but circumvented it by pointing out that Texas could not justify its multi-member districts on the basis of history. The court pointed out that, except for the 1965 plan (the *Kilgarlin* plan), *all* Texas metropolitan areas had historically been multi-member districts. Since Texas had redistricted Harris County into single-member districts, the court reasoned, it could no longer justify on a historical basis multi-member districts. The court overlooks the fact that the *Kilgarlin* plan was a part of Texas history. Harris County in 1971 had a history of different treatment, approved by this court. Harris County simply did not fall "within the same historical context as any other city" as the court stated it did.[37] As explained above, for prac-

[37] A.Jur.S. 35A. In addition, the court concluded that Texas could not justify its plan on a historical basis because "history is a questionable justification for unequal treatment in a state with a history of rather active segregation and a state which has always been a 'one-party' state." A.Jur.S. 34A. *See* Brief for Appellant at 29 n.20. Appellees, in connection with the racial history of Texas, cite *Taylor* v. *McKeithen*, ... U.S. ....., 32 L.Ed.2d 648 (1972), for the proposition that racial history would preclude justifying multi-member districts on a historical basis, and also as a distinction between this case and *Whitcomb*. In *Taylor*, however, the particular practice under attack (the drawing of district lines), itself had a long history of bias and franchise dilution. 32 L.Ed.2d at 650 n.3. In Texas, the particular practice under attack (the use of multi-member districts) does not itself have a history of bias. *Taylor* does not substantiate that the validity of multi-member districts is examined upon a basis other than the *Whitcomb* basis solely because a state has a "rather colorful history of racial segregation."

tical reasons Harris County could not be subdivided as it had been in 1965 and thus, since a change was necessary, it was more reasonable to subdivide it into single-member districts than to redistrict it into a county-wide multi-member district.[38]

V.

THE RECORD DOES NOT SUPPORT THE FINDINGS OF THE COURT BELOW AND THE ASSERTIONS OF APPELLEES HERE THAT NEGROES AND MEXICAN-AMERICANS ARE EFFECTIVELY EXCLUDED FROM THE POLITICAL PROCESS DUE TO THE USE OF MULTI-MEMBER DISTRICTS IN DALLAS AND BEXAR COUNTIES.

A. Dallas County.

Rather than responding in a meaningful way to the arguments and analysis of Appellants, both the Appellees and the Amicus have paraphrased or quoted extensively from the "findings" of the court below, merely regurgitating the language of that court's opinion. Some of the Appellees attempt to support the trial court's "findings" by quoting selected words and phrases from the depositions and trial transcript. While their briefs are entertaining, if not to say sensational, they collectively fail to come to grips with Appellants' argument: (1) that the findings of the trial court lack relevance under *Whitcomb;* (2) that the trial court erroneously misplaced the burden of proof by requiring the State to prove effective participation by minority groups; and (3) that by equating effective participation with participation as "a matter of right," the trial court effectively held multi-member districts *per se* invalid. If it stands for nothing else, *Whitcomb* v. *Chavis* clearly places the burden of proof on the challenger of the multi-member district, *not* on the State to meticulously

[38] See Crawford Martin Deposition, pp. 24-26, 6 App. 1585-87.

prove access as "a matter of right" of every conceivable minority group, from Negroes to Republicans, to the political process.

Central to the ruling of the court below that the use of a multi-member legislative district in Dallas County violated standards of equal protection was the finding that selection of Black candidates by the slate-making D.C.R.G. (Democratic Committee for Responsible Government, erroneously referred to by the court below and by the Appellees here as the "Dallas Committee for Responsible Government") did not respect the wishes of the Black community. The inference is that the D.C.R.G. selected token[39] "Toms" as Black candidates. In fact, one of the plaintiffs' own witnesses, Dan Weiser, admitted that Zan Holmes, a Black legislator from Dallas, was endorsed by a meeting of Black leaders *prior* to his endorsement by the D.C.R.G. (2 App. 453).

Moreover, it appears that the D.C.R.G., rather than being a group of downtown businessmen, representing the "establishment," was in fact, according to State Senator Oscar Mauzy, another of the plaintiffs' witnesses, an organization formed by *precinct chairmen* of the Democratic Party in Dallas County. See testimony quoted in Brief for Appellants p. 32 n. 27. Precinct chairmen are, of course, all elected from "single-member districts" and are the elected politicians closest to the people. The D.C.R.G. is therefore a grass roots political organization.

As far as the *power* of the D.C.R.G. is concerned, the record clearly reflects that the D.C.R.G. wields *political*

[39] The testimony of William B. Clark III, one of the directors of the D.C.R.G., is illustrative of the fallacy of the assertion of the court below that the D.C.R.G. is a racist organization that seeks to under-represent Blacks. Clark testified that the D.C.R.G. planned to support three Blacks and one Mexican-American as candidates for the legislature in the 1972 race. (4 App. 943)

power, not *racial* power. Another of the plaintiffs' witnesses, Dr. Conrad, stated that he doubted that a *white* could be elected without the endorsement of the D.C.R.G. (3 App. 582).

The court below also found that Black citizens of Dallas County were denied effective representation by the State Representatives elected from Dallas County. (A.Jur.S. 40A-41A). In fact, the record reflects a remarkable degree of interest by Dallas County legislators in Black community problems. One such problem of the Black community involved a proposal to construct an elevated highway in the Spence community of South Dallas. The proposed highway project was modified from an elevated highway to a ground level highway. Dr. Conrad testified concerning the role of the Dallas County legislators:

> "Q. Now, Dr. Conrad, the State Highway Department had proposed to build an elevated highway through the Spence community in South Dallas County, had it not?
>
> A. Yes.
>
> Q. And that was through a predominantly black area?
>
> A. That's correct.
>
> Q. And many of our black citizens in that area objected to the building of that elevated highway, because they felt there would be rapes, murders and other crimes committed under it. Is that true?
>
> A. More than just that.
>
> Q. And unsightly?
>
> A. Unsightly. The community felt as though they had not been consulted adequately. The [sic] felt as though there had not been adequate representation in their behalf at Austin, since there were no blacks sitting on the Commission that designed the highway.
>
> Q. Now, isn't it true that all 15 members of the

Legislative Delegation from Dallas County who were elected at large went to the Highway Department for the black community and assisted in getting that highway lowered to ground level the way the black community wanted it?

A. I don't know whether all 15. I do know that after a mass meeting that was chaired by the three black elective officials in Dallas that we got massive support from all over, and I would rather suspect that we did have all 15 of the legislators." (3 Ap. 590-91).

Dr. Conrad further testified that he believed that the Dallas County legislators were influenced by Black voting power:

"Q. Now, don't you feel that one of the main reasons that those 15 members from Dallas County helped get that highway lowered through the Spence community was because the black community was a principal motivating factor in getting them elected in the November primary (sic)?

A. Why, certainly." (3 App. 592-93).[40]

The court below employed a litmus paper test concerning the effectiveness of the D.C.R.G., saying:

"Since the Reconstruction Era, there have been only two blacks from the Dallas County delegation to the Texas House of Representatives. In addition, these have been the only two blacks ever slated by the DCRG, and the first was not until 1966." [A.Jur.S. 40A, n. 17].

Politics, however, is rarely so simple a matter as the court below seems to believe. For example, Rev. Zan Holmes, a Black Dallas County legislator (and one of the plaintiffs' witnesses) testified that Berlaind Bashear, one of the un-

[40] It gives without saying that the impact of fifteen legislators upon a State commission is greater than the impact of the two or three whose single-member districts would be affected.

successful Black candidates referred to by the court below, had only lived in Dallas for three or four years at the time of his unsuccessful race in 1970, and was relatively unknown. (3 App. 629).

Finally, the court below, apparently sensing that the record before it would not justify findings of what this Court found missing in *Whitcomb* v. *Chavis*, attempted to distinguish that case on the grounds that (1) the political and racial conditions currently prevailing in Dallas County differed from those prevailing in Marion County and (2) Texas' history of race relations differed from Indiana's.

To the extent that the court, in drawing its distinction, relied on evidence rather than "judicial notice," the only significant testimony on this point was that of the plaintiffs' "expert" witness, Dr. Clifton McClesky, who testified that, at the request of the plaintiffs, he made a comparative study with respect to minority group access to the political process in Indiana, as compared with Texas. (2 App. 464-80). Under cross-examination, however, Dr. McClesky admitted that his knowledge of Marion County, Indiana, was sketchy and secondhand at best and demonstrated this by his ignorance of the fact that Indianapolis is in Marion County:

"Q. Have you ever visited Marion County in Indiana?
A. No.

Q. Have you ever made a study of Marion County, Indiana?
A. No. I am not concentrated on Marion County. I have read some articles on Indiana politics, generally.

Q. Have you ever visited Indianapolis?
A. Yes. I have been in Indianapolis.

Q. Have you ever made a study of conditions in Indianapolis?
A. No, I have not.

• • •

"Q. You have undertaken to give testimony about conditions that exist in the Indiana as compared with the conditions that exist in Texas, have you not?

A. Yes.

Q. But you are not prepared to tell this Court about the conditions that exist in Marion County?

A. No, I am not." (2 App. 486, 488).

In addition to this testimony, the court below took judicial notice of the racial history of Texas in general and of Dallas County in particular. (A.Jur.S. 41A-42A). Initially, it should be noted that it has been some time since racial segregation was the law in Texas. The most recent instance of interference in attempts by Negroes to vote in Dallas County was in 1956. (3 App. 523). And, in the words of Judge Goldberg:

"JUDGE GOLDBERG: Clearly, it is not overly relevant to the ultimate issues in this case. '56 has been a long, long time ago." (3 App. 525).

Yet, when the court wrote its opinion it premised its finding of "a recurring poor performance on the part of the Dallas County delegation concerning the representation of black interests in the Texas House of Representatives" on the mere fact that "State legislators from Dallas County, elected countywide, led the fight for segregation legislation during the decade of the 1950's." (A.Jur.S. 41A).

B. Bexar County.

With regard to Bexar County, Appellees have made no attempt to conform the lower court's opinion to the guidelines set forth in *Whitcomb*. No argument is made that the multi-member district in Bexar County in any way operates to cancel or dilute the voting strength of Mexican-Ameri-

cans. Instead, Appellees, as did the court below, chronicle the economic and cultural deprivation suffered historically by Mexican-Americans, argue that Mexican-Americans constitute an identifiable ethnic minority, point out repeatedly the adverse effect on Mexican-American political participation of the poll tax, execessive filing fees, annual voter registration requirements, and the voter residency requirements, and conclude, therefore, that Bexar County should have single-member districts. This history need not be controverted since it in no way meets the requirements set forth in *Whitcomb*.

Appellees attempt to distinguish *Whitcomb* on the basis that Indiana has a viable two-party system where "well disciplined minorities" and interest groups can form coalitions and influence elections. They contrast this to the one-party situation in Bexar County, and argue that in Texas, the party does not control the nomination process or formulate a "slate", thus several candidates usually offer themselves for each place. As a result, there is generally a "runoff", and "when a candidate favored by a minority enters a primary election and wins the first round, he is almost invariably forced into a runoff and defeated when all opposing forces combine and join against him." Appellees draw no conclusions from these distinctions, other than that they are distinctions. Some conclusions, however, are apparent. The court in *Whitcomb* considered the importance of party control and formulation of the "slate" in the context of whether minorities were able to participate in the formulation of the slate. Thus, the facts that in Bexar County there is no slate, that anyone who so desires may offer himself as a candidate, and that "several candidates usually offer themselves for each place" leads to the conclusion that there is no denial whatsoever of the right to participate in the political process, and indeed shows active participation.

Appellees' argument with regard to Bexar County is set forth in summary at page 50-51 of the Bernal Brief:

> ". . . It is the opportunity to participate that is important; the opportunity to elect a legislator of one's choice or, once elected, to remove him at the next election if his constituency is so disposed. It is this lack of opportunity to participate that this case is about."

Appellees equate the electing of a legislator with voting for a legislator of one's choice. They equate participation in politics with winning in politics. This court in *Whitcomb* expressly held this *not* to be the correct standard. Appellees do not argue that Mexican-Americans are denied access to the political system, that they are denied the right to participate fully in the political system, or that the multi-member district operates to cancel or dilute their votes. Instead, they argue that they lose elections, and given single-member districts, they could win.

CONCLUSION

For the foregoing reasons, Appellants respectfully pray that the judgment of the court below be, in all things, reversed, and the redistricting plan enacted by the Legislative Redistricting Board be declared to satisfy the requirements of the Fourteenth Amendment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that three copies of the foregoing Reply Brief For Appellants have this the .... day of February, 1973, been served upon each counsel of record for Appellees in accordance with Rule 33 of this Court, by depositing the same in a United States Mailbox, with airmail postage prepaid, addressed to said counsel at their post office addresses.

.....
Leon Jaworski